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No. 870

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1962

THE CONGREGATION OF SISTERS OF CHARITY OF THE INCARNATE WORD, *Petitioner*

VERSUS

THE CITY OF SAN ANTONIO, TEXAS, AND THE STATE OF TEXAS, *Respondents*

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, the City of San Antonio, Texas, and the State of Texas, file this brief in opposition to the Petition for Writ of Certiorari to the Court of Civil Appeals for the Tenth Supreme Judicial District of Texas heretofore filed by Petitioner, and respectfully pray that such petition be denied for the reasons hereinafter set forth.

I.

OBJECTIONS TO JURISDICTION

A. *Failure of Petitioner to Raise Questions in State Courts.*

Petitioner, in outlining the "Questions Presented" (Pet., pp. 4-5) alleges that two constitutional questions are involved. The first question posed by Petitioner is whether the agreement by Respondent, City of San Antonio (hereinafter designated "City"), to convey dedicated park land to Respondent, State of Texas, (hereinafter designated "State") deprives Petitioner of property without due process of law (Pet., p. 4); and whether the agreement by the City to convey said park land to the State, under authority of Art. 6674 W-3, Texas Revised Civil Statutes, amounts to the passage of a law by the State impairing the obligation of contracts, contrary to the contract clause of the Federal Constitution. (Pet., p. 5)

Neither of these two alleged Federal constitutional questions were raised by Petitioner in either of the three state courts in which it attacked the agreement in question. Excluding the allegations in its Petition for Writ of Certiorari filed in this Honorable Court, among all the pleadings, briefs, and motions for rehearing, including the Application for Writ of Error to the Supreme Court of the State of Texas, nowhere do we find an assertion of rights guaranteed by the Federal constitution made by Petitioner. If Petitioner wished to conceal the true basis for its alleged cause of action from the Texas courts, he was unqualifiedly successful. This highly successful attempt by Petitioner to conceal the basis

for its claim in all probability is sufficient to explain not only the complete failure of the Texas Court of Civil Appeals to deal with the purported Federal questions in its opinion (Pet., p. 10 *et seq.*), but also the complete failure of Petitioner to comply with Supreme Court Rule 23(1)(f) which requires that the Petition for Certiorari "shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears (e. g., ruling on exception, portions of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." In view of the state of the record in this case, the requirement just quoted placed on Petitioner a burden which it could not meet. Petitioner's failure to comply with such requirements of Rule 23 necessarily amounts to a failure of the Petition for Certiorari to show "that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

B. *No Federal Questions Are Involved.*

In addition to the contention that the agreement between the City and the State deprived Petitioner

of property without due process of law, and that the sustaining of said agreement under Art. 6674W-3, Texas Revised Civil Statutes, makes such statute invalid as state legislation impairing the obligation of contract, Petitioner, on page 4 of its Petition, advances the contention that a Federal question is involved in the determination of "whether Article 6674W-3, Texas Revised Civil Statutes, is restricted in its application to Interstate and Defense Controlled Highways under Title 23, U. S. C."

In replying to these contentions, Respondents will consider them in the order in which they are presented on pages 4-5 of the Petition.

(1). *Construction of the State Statute.* Petitioner makes no argument in support of the novel contention that the question of interpretation of a state statute involves a Federal question. There is the claim that the manner in which the statute was construed makes it invalid under the Contract Clause, but that claim is made in an attempt to raise a separate and distinct Federal question. The Texas courts have held that the statute in question is applicable and authorizes the conveyance of park land by the City to the State. It is elementary that all questions of application of a state statute are foreclosed to the Supreme Court of the United States on appeal from a decision of a state court construing the statute. *Greenough* v. *Tax Assessor of Newport*, 331 U. S. 486. The Supreme Court of the United States will accept a state court's interpretation of a state statute relating to the condemnation of land, which is the subject matter of the portion of Art. 6674W-3 in dispute in this cause. *Boston Chamber*

of Commerce v. *Boston*, 217 U. S. 189. Thus, in *Roe* v. *Kansas ex. rel. Smith*, 278 U. S. 191, this Court held that it was bound by the construction placed by the state court on a statute authorizing the acquisition, by exercise of the power of eminent domain, of places of historical interest.

It is apparent, then, that the first purported ground of jurisdiction is frivolous. Whether the Texas statute in question is applicable to the present case is a matter which is the sole concern of the Texas judiciary. This Court is bound by the determination by the Texas courts that, under Article 6674W-3, the State of Texas had authority to condemn park land owned by the City of San Antonio, and that the statute is not limited in its application to Interstate and Defense Controlled Highways.

2. *The Due Process Question.* Petitioner makes the bland assertion that the agreement contemplating the conveyance of park land by the City of San Antonio to the State of Texas deprives petitioner of property without due process of law and, therefore, violates the Fourteenth Amendment to the Constitution of the United States. Perhaps, at this point, some inaccurate statements made by Petitioner may be properly challenged. On page 6 of the Petition it is asserted that under the contract in question the City agreed to "give away" the park land in question to the State for highway use. This statement is false. The agreement in question involves ample consideration moving from the State to the City. The State agrees to bear a portion of the cost of acquiring right-of-way and also agrees to bear the entire cost of construction of the highway and its maintenance after

it is built. (TR-97-109). The State is to pay dearly for this "gift." The Petitioner makes statements on page 7 that are somewhat distorted and does not make citations to the record in connection with some of them. The total park area is three hundred and ninety (390) acres and the proposed expressway will take about fifteen (15) acres thereof (TR-113); the use of the said fifteen (15) acres for expressway purposes will be a use inconsistent with park purposes, but it is *not* "undisputed that the construction of an expressway through such park will effect a diversion of the original dedication, and be contrary to the deed restrictions, and be a use inconsistent with the use as a public park" as to the three hundred and seventy-five acres remaining. In order to understand the physical facts in this case one should refer to Defendants' Exhibit #1, a large photographic map showing the overall park, the Petitioner's property, and the route of the proposed expressway, such exhibit having been introduced in evidence by agreement (TR-5-10), and sent up to the appellate courts as a separate instrument.

Petitioner relies on a footnote found in *Reichelderfer* v. *Quinn*, 287 U.S. 315. The actual holding by this Court in *Reichelderfer* was that abutting owners had no cause to complain where Congress, after dedicating certain land to park purposes, by subsequent legislation authorized the construction of a fire station in the park. In the footnote at which Petitioner desperately grasps, apparently mistaking it for a straw, the Court merely distinguished certain cases which, the Court said, "indicated that" conveyance of land to a governmental agency to be used as

a park is subject to a condition, or imposes a trust, that the use be continued. On page 8 of its Petition, Petitioner, by carefully failing to include the entire footnote, and particularly the words "indicate that," seeks to give the erroneous impression that *Reichelderfer* involves a holding which supports Petitioner's contention.

Petitioner admits that the case at bar is not similar to *Reichelderfer*, but says that "the propositions asserted by petitioner were recognized by this Court in the *Reichelderfer* case." (Pet., p. 8) This is another false statement. The Court there squarely ruled against the contention of the abutting owners that the diversion of the park land constituted a taking of property without just compensation.

In any event, Petitioner fails completely to show the nature of the "property" of which it is being deprived. Decisions by this Court concerning the rights of abutting owners in parks owned by the Federal Government are completely irrelevant to the question of the rights of citizens of San Antonio in park lands owned by the City. Even prior to the decision in *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, matters relating to the system of rights in property within a state were not considered to be proper subjects for the independent determination of this Court by reference to an assumed Federal common law, but were left entirely to the determination of the state courts.

Petitioner's reliance on *Barclay* v. *Howell's Lessee*, 31 U. S. 498 (mistakenly cited in Petitioner's brief as 31 U. S. 495) is misplaced. The quotation

from that case on page 8 of the Petition begins with the word "if", so that it appears even from the bob-tailed quotation found in the Petition that the Court was assuming a situation which was not before it. Even so, the Court further qualified its "iffy" statement by noting that if such other facts were present, they "might" afford ground for injunction.

Neither of the two dicta relied on by Petitioner involve cases of park land owned by a municipality which was conveyed by it to a governmental agency for a public purpose in furtherance of which the grantee public agency might have acquired the land by the exercise of the power of eminent domain. That is the exact situation here. The City, a creature of the State, having no constitutional rights which it could assert against its creator, conveys land to the State to be used for highway purposes. Clearly, the State, as sovereign, could have, at the very least, acquired the land in question by exercising its power of eminent domain. The Texas courts have held that the State had such power under Art. 6674W-3, and that interpretation is binding on this Court. But, even without the statute, the same conclusion is compelled by elementary principles of the law of eminent domain.

Eminent domain is an inherent attribute of sovereignty. Therefore, the power to take property for a public use is within the sovereign power of the State of Texas and requires no additional justification. The only limitation on the power of eminent domain possessed by the State of Texas is the requirement, found in the State constitution, and also imposed by the due process clause of the Fourteenth

Amendment, that just compensation be paid. See *Shoemaker* v. *United States*, 147 U. S. 282.

Since, therefore, the State could have condemned the land in question, the City and the State are free to agree on the terms and consideration of a voluntary conveyance, irrespective of the claimed common law or statutory rights of abutting owners, irrespective of state statutes or charter provisions calling for elections as conditions precedent to the conveyance of park land by municipalities, and irrespective of reverter clauses in deeds through which the City acquired title to the land in question. This proposition is amply supported by the following decisions by state courts: *People* v. *City of Los Angeles*, 1 West's Cal. Rep. 531; *Welch* v. *City & County of Denver*, 349 P. 2d 352 (Colo.); *Prekarski* v. *Smith*, 153 A. 2d 587 (Del.); *City of Louisville* v. *Milton*, 247 S. W. 2d 975 (Ky.); *Burnes* v. *Metropolitan District Commission*, 92 N. E. 2d 381 (Mass.); *City of Tyler* v. *Smith County*, 246 S. W. 2d 601 (Tex.); *El Paso County* v. *City of El Paso*, 357 S. W. 2d 783 (Tex.); *Kingsville Independent School Dist.* v. *Crenshaw*, 161 S. W. 2d 49 (Tex.). This array of authority is made even more impressive by Petitioner's failure to cite any authority to the contrary.

This Court has recognized fully the principle on which Respondents rely. In *Kohl* v. *United States*, 91 U. S. 367, Mr. Justice Strong said, at pp. 371-372:

> It has not been seriously contended during the argument that the United States government is without the power to appropriate lands or other property within the states for its own pur-

> poses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, or if any other authority, can prevent the acquisition of the m ans or instruments by which alone governmental functions can be performed. * * * If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a state prohibiting a sale to the federal government, the constitutional grant of power may be rendered nugatory. * * * No one doubts the existence in the state governments of the power of eminent domain, — a right distinct from and paramount to the right of ultimate ownership. It grows out of the necessities of their being. * * * The right is the offspring of political necessity; and it is inseparable from sovereignty unless denied to it by its fundamental law.

Closely in point is *United States* v. *Carmack*, 329 U. S. 230. There the Federal Government was attempting to acquire, as a site for a post office, land held in trust by the City of Cape Girardeau, Missouri and used for such public purposes as those of a park, court house, city hall and library. The complainant, opposing such acquisition by the Federal Government, relied on the fact that the land in question was being used by the city for public purposes which had been impressed upon the land by the private owner. This Honorable Court referred to the decision in *Kohl* as a complete answer to the contention that the decisions of federal representatives had to be subordinated to those of individual grantors or local officials.

Respondents concede that if, under applicable law, Petitioner has some property right in the park land in question which will be destroyed by the use of the land for highway purposes, they will be entitled to compensation. Respondents have never denied the existence of a right to compensation under such circumstances. The Texas law, as pronounced by the Texas courts, recognizes that Petitioner would be entitled to recover, in an appropriate proceeding, such damages as they could establish to the market value of their property resulting from the use of the 15 acres of park land for highway purposes. This right was expressly recognized in *Kingsville Independent School Dist.* v. *Crenshaw*, 164 S. W. 2d 49 (Tex. Civ. App.). But Petitioner here is not seeking damages for property taken, damaged or destroyed. Instead, Petitioner is seeking an injunction on the ground that the sovereign, the State of Texas, has no right to take.

Since the Due Process Clause limits the state's power of eminent domain only to the extent of requiring that if property is taken for public use, compensation shall be paid, and since, under Texas law, if Petitioner can establish that its property has been taken, damaged or destroyed, it would be entitled to compensation, it is obvious that Petitioner is being deprived of no right guaranteed to it under the Due Process Clause of the Fourteenth Amendment.

3. *The Impairment of Contract Issue.* Petitioner says that "the practical effect of the voluntary free gift of the lands, in reliance upon Article 6674W-3, Texas Revised Civil Statutes, impairs the obligation of the City of San Antonio to enforce the

contract between it and the public, whereby such city holds the lands in question in trust for the public. Such action, therefore, is contrary to the United States Constitution, Article 1, Sec. 10." (Pet., pp. 9-10)

Respondents will frankly admit their puzzlement at the assertion that the City, by conveying land to the State in alleged violation of a restriction contained in the conveyance to the City, is impairing the obligation of the City to enforce the contract between it and the public whereby the City holds the land in trust for the public. There simply is no contract between the City and the public whereby the City holds the land in trust. The contract, if any, was between the City and its grantor. There is no rational basis for finding any obligation on the part of the City to enforce a non-existent contract between it and the public. Respondents, at least, are not surprised by Petitioner's failure to cite authority in support of its contention.

In any event, a full answer to the contention of Petitioner will again be found by considering elementary principles of the law of eminent domain. Assuming that the Petitioner has some sort of contract right, there is nothing peculiar about contract rights which places them beyond the reach of the power of eminent domain. "All contracts are subject to the right of eminent domain." *Home Building and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 435. See also *West River Bridge Co.* v. *Dix*, 5 How. 507.

In *City of Cincinnati* v. *Louisville & N. R. R. Co.*, 223 U. S. 390, the City of Cincinnati condemned

a right of way across a public landing, which landing had been dedicated for the public use of the town forever. The abutting owners contended that the taking of the land for a different public use amounted to an impairment of their contract rights. The Supreme Court said (223 U. S. at p. 400):

> The constitutional inhibition upon any state law impairing the obligation of contracts is not a limitation upon the power of eminent domain. The obligation of a contract is not impaired when it is appropriated for a public use and compensation made therefor. Such an assertion of power neither challenges its validity nor impairs its obligation. Both are recognized, for it is appropriated as an existing enforceable contract. It is a taking, not an impairment of its obligation. If compensation be made, no constitutional right is violated.

Respondents repeat: At no time has the right of Petitioner to compensation for such of its property as may be taken been disputed. The only point in issue here is the right of Petitioner to prevent the taking, if any.

II. CONCLUSION

It is abundantly clear that the Petition for Certiorari should be denied in this case. The purported "Federal" questions relied on by Petitioner were not timely raised in the state courts, and this Court is without jurisdiction to review the judgment of the state court. In any event, the contentions advanced by Petitioner are so patently without merit as to call for the denial of the writ.

WHEREFORE, Respondents respectfully pray that this Honorable Court in all things deny the Petition for Certiorari in this case.

THE STATE OF TEXAS and
THE CITY OF SAN ANTONIO, TEXAS

By .....

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